

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of Section 73.202(b),)	
Table of Allotments,)	MB Docket No. 09-189
FM Broadcast Stations.)	RM-11564
(Kahuku and Kualapuu, Hawaii))	

**REPORT AND ORDER
(Proceeding Terminated)**

Adopted: February 16, 2011

Released: February 18, 2011

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division issued a Notice of Proposed Rule Making in response to a Petition for Rule Making filed by Kona Coast Radio, LLC (“Petitioner”).¹ The Notice proposes to amend the FM Table of Allotments, Section 73.202(b) of the Commission’s rules, by allotting Channel 296C3 at Kahuku, Hawaii, as a first local service. In this Report and Order, we address the proposal contained in the Notice as well as the following proposals, each of which is mutually exclusive with the allotment of Channel 296C3 at Kahuku: (1) a counterproposal for allotment of FM Channel 296C2 at Kualapuu, Hawaii, as a first local service;² and (2) a minor change application for upgrade of the facilities of FM Station KNAN, Nanakuli, Hawaii, from Channel 294C3 to Channel 294C2.³ For the reasons discussed below, we dismiss Petitioner’s proposal to allot Channel 296C3 at Kahuku, and, instead, we allot Channel 296C2 at Kualapuu and grant the upgrade of FM Station KNAN, Nanakuli, to Channel 294C2.

2. Petitioner filed comments supporting the allotment changes proposed in the Notice. A counterproposal was filed by Kemp Communications, Inc. (“Kemp”). In lieu of the allotment change proposed by Petitioner, Kemp advocates allotting FM Channel 296C2 at Kualapuu, Hawaii, as a first local service. In support of its proposal, Kemp states that Kualapuu is a Census Designated Place with a 2009 population of 2,077 persons, an increase of six percent over the 2000 population. Kemp further states that the United States Postal Service maintains a Post Office in Kualapuu, whose zip code is 96757. Kemp also represents that Kualapuu has its own school, and that there are numerous business establishments located in the community, including several with the word “Kualapuu” in their business names. Concurrently with the filing of its counterproposal, Kemp filed a construction permit for the proposed Kualapuu channel, paid the necessary filing fee, and states that, if the allotment is made, Kemp intends to prosecute its application and, if granted, to construct and operate the proposed station.⁴

3. On August 10, 2009, Big D Consulting, Inc. (“Big D”), filed an application seeking to upgrade FM Station KNAN, Nanakuli, Hawaii, from Channel 294C3 to 294C2.⁵ Although Petitioner’s petition for

¹ *Kahuku, Hawaii*, Notice of Proposed Rule Making, 24 FCC Rcd 12905 (MB 2009) (“*Notice*”).

² *Public Notice*, Report No. 2921 (*rel.* Dec. 1, 2010).

³ See File No. BPH-20090810ACM.

⁴ See File No. BNPH-20091214AEI.

⁵ See n. 3, *supra*.

rule making to allot Channel 296C3 at Kahuku was received by the Media Bureau on July 24, 2009, the petition was not received and stamped in the Office of the Secretary until August 18, 2009, because Petitioner had erroneously directed its petition to “Chief, Audio Division, Allocations Branch, Media Bureau.”

4. The requirement for all filings in FM allotment proceedings is that “[t]he first page and cover sheet of each filing must indicate ‘To: Office of the Secretary,’” and that “[i]ncorrectly addressed filings will be treated as having been filed on the receipt date shown on the official ‘Office of the Secretary’ date stamp.”⁶ Reliance upon the official date stamp by the Office of the Secretary is consistent with the Commission’s policy that “[t]he Secretary’s date stamp is authoritative and conclusive,” superseding contrary representations regarding the date that a document was filed.⁷ After issuance of the *FM Allotment Public Notice*, we emphasized numerous times that “[t]his processing rule will be strictly followed.”⁸ For filings after release of the *FM Allotment Public Notice*, no leniency has been afforded parties who failed to properly address their filings to the Office of the Secretary. We therefore have rejected filings as untimely, where the filings were improperly addressed to the Audio Division and were not received and stamped by the Secretary until after the applicable deadline.⁹

5. Applying our allotment filing requirements, we find that the filing date of Petitioner’s petition for rulemaking is August 18, 2009, the date of its official date stamp by the Office of the Secretary. August 18, 2009, is eight days after Big D submitted its minor change application for FM Station KNAN. The Commission’s rules provide that a petition to amend the Table of Allotments will not be considered if it is filed after the date that a conflicting FM application was filed.¹⁰ Accordingly, under the Commission’s rules, Petitioner’s proposal to allot Channel 296C3 at Kahuku is cut off by Big D’s minor change application to upgrade FM Station KNAN at Nanakuli, and Petitioner’s proposal will not be considered. We therefore grant Big D’s upgrade proposal for FM Station KNAN, and we dismiss the petition for rule making to allot Channel 296C3 at Kahuku.

6. The upgrade of FM Station KNAN is not mutually exclusive with Kemp’s proposal to allot Channel 296C2 at Kualapuu. We find that Kualapuu is a community for allotment purposes, and that the public interest would be served by allotting an FM channel as a first local service at Kualapuu. Because Petitioner’s proposal to allot Channel 296C3 at Kahuku is cut off by the minor change application for KNAN, there is no impediment to allotment of Channel 296C2 at Kualapuu. For that reason, we shall allot Channel 296C2 at Kualapuu, Hawaii, as that community’s first local service. The reference coordinates for FM Channel 296C2 are 21-10-57 NL and 157-13-26 WL, at a site 19.4 km (12 miles) west of Kualapuu.

⁶ See *Filing Requirements in FM Allotment Rulemaking Proceedings*, Public Notice, 20 FCC Rcd 7502 (MB 2005) (“*FM Allotment Public Notice*”).

⁷ *Richardson Independent School District*, Memorandum Opinion and Order, 5 FCC Rcd 3135, 3136 (1990) (“*Richardson*”). See also *Ole Brook Broadcasting, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 20644 (2000) (citing *Richardson* with approval).

⁸ See *Roma, Texas*, Memorandum Opinion and Order, 21 FCC Rcd 10007, 10008, n.7 (MB 2007), *app. for rev. pending* (“*Roma*”); *Caliente and Moapa, Nevada*, Memorandum Opinion and Order, 21 FCC Rcd 11481, 11483 (MB 2006) (“*Caliente*”); *Monument, Oregon*, Report and Order, 21 FCC Rcd 10017, n.2 (MB 2006); *Dallas, Oregon*, Report and Order, 20 FCC Rcd 9715, n.2 (MB 2005); and *St. Florian, Alabama*, Report and Order, 20 FCC Rcd 8814, 8815 (MB 2005).

⁹ See *Roma* and *Caliente*, *id.*

¹⁰ See 47 C.F.R. § 73.208(a)(3)(iii). See also *Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, 7 FCC Rcd 4917, 4919-20 (1992), *recon. granted in part*, 8 FCC Rcd 4743 (1993); and *Amherst and Lynchburg, Virginia*, 19 FCC Rcd 34 (MB 2004) (petition for rule making could not be considered when filed six days after one-step upgrade application).

7. The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.¹¹

8. Accordingly, IT IS ORDERED, That effective April 4, 2011, the FM Table of Allotments, 47 C.F.R. Section 73.202(b), IS AMENDED as follows:

<u>Community</u>	<u>Channel Number</u>
Kualapuu, Hawaii	296C2

9. IT IS FURTHER ORDERED, That the initial petition filed by Kona Coast Radio, LLC, seeking the allotment of FM Channel 296C3 at Kahuku, Hawaii, and the associated application, File No. BNPH-20090723AED, ARE DISMISSED.

10. IT IS FURTHER ORDERED, That the Form 301 minor change application filed by Big D Consulting, Inc., for FM Station KNAN, Nanakuli, Hawaii, to upgrade its facilities to operate on Channel 294C2, File No. BPH-20090810ACM, IS GRANTED.

11. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send by Certified Mail, Return Receipt Requested, a copy of this Order to the following:

Victor A. Michael, Jr.
Kona Coast Radio, LLC
87 Jasper Lake Road
Loveland, Colorado 80537

James A. Koerner, Esq.
Koerner & Olender, P.C.
111913 Grey Hollow Court
North Bethesda, Maryland 20852-5706

12. The window period for filing applications for Channel 296C2 at Kualapuu, Hawaii, will not be opened at this time. Instead, the issue of opening a filing window for this allotment will be addressed by the Commission in a subsequent *Order*.

13. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

14. For further information concerning this proceeding, contact Deborah Dupont, Media Bureau, (202) 418-7072. Questions related to the application filing process for Channel 296C2 at Kualapuu, Hawaii, should be addressed to the Audio Division, Media Bureau, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

Nazifa Sawez
Assistant Chief, Audio Division
Media Bureau

¹¹ See 5 U.S.C. § 801 (a)(1)(A).